



NEZ PERCE

hrinfo@pps.k12.or.us

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305, LAPWAI, IDAHO 83540, (208) 843-2253

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Ms. Donna Darm
Acting Regional Administrator
National Marine Fisheries *Service*
Northwest Region
7600 Sand Point Way NE
Bin C15700, Bldg I
Seattle, WA 98115-0070

Federal Caucus
c/o Ms. Jennifer Miller
BPA-P-6
P.O. Box 3621
Portland, Oregon 97208-3621

Re: Nez Perce Tribe's concerns with NMFS's Draft Biological Opinion on the Federal Columbia River Power System and the United States' "All H Paper"

The Nez Perce Tribe is extremely concerned by the National Marine Fisheries Service's Draft Biological Opinion on the Columbia River Power System and *the* accompanying "Strategy for Salmon" ("All-H Paper").¹ We are especially concerned because with the loss of the salmon and *the* failure to rebuild the runs comes the loss of our people's way of life, our sustenance, our culture, our spiritual beliefs and our economies which have been intricately intertwined with the salmon since time immemorial.

¹ We incorporate by reference the comments approved by the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Bands and Tribes of the Yakama Indian Reservation, and the Confederated Tribes of the Warm Springs of Oregon submitted via the Columbia River Inter-Tribal Fish Commission.

In our 1855 Treaty, the Nez Perce Tribe expressly reserved, and the United States expressly secured to the Tribe, our right to take fish at all usual and accustomed fishing places. The United States Constitution recognizes our treaties as "the supreme law of the land." In addition, the United States has a trust responsibility to protect these treaty-reserved resources. The United States' affirmative treaty and trust obligations are separate and distinct from the United States' responsibilities to comply with other statutory laws such as the Clean Water Act (CWA) and the Endangered Species Act (ESA), and require much more than simply avoiding extinction and perpetuating museum-piece runs.

We have repeatedly attempted to ensure that the United States fulfills these obligations, and have met with federal representatives on several occasions. Unfortunately, these meetings *have* not constituted meaningful consultation to alleviate or remedy the Tribe's concerns, and the United States' draft salmon plans:

fail to honor the United States treaty obligations to the Nez Perce Tribe;
fail to honor the United States trust obligations to the Nez Perce Tribe;
fail to comply with the Clean Water Act; and fail to comply with the Endangered Species Act.

The United States' draft salmon plans fail to ensure that Snake River salmon will avoid extinction and will be rebuilt to harvestable levels consistent with the United States' treaty and trust obligations to the Nez Perce Tribe.

The United States must ensure that Snake River salmon not only avoid extinction, but that these runs are rebuilt to *harvestable* levels sufficient to fulfill the Nez Perce Tribe's treaty-reserved rights and the United States' trust responsibility to the Tribe.

Rather than focus on rebuilding the runs consistent with their treaty and trust obligations, the United States settles on the much lower standard of "avoiding short-term extinction risk" and measuring risk by comparison to "absolute extinction."

The United States' draft salmon plans fail to follow the only peer-reviewed analysis of what is necessary to protect Snake River salmon and steelhead from extinction and rebuild them to healthy, harvestable populations-breaching the four lower Snake River dams.

The exhaustive, comprehensive, collaborative, peer-reviewed Plan for Analyzing and Testing Hypotheses process determined that breaching the four lower Snake River dams provides the best opportunity for recovering Snake River salmon. *This is a* conclusion that has also been independently reached by the United States Fish and Wildlife Service's Coordination Act Report; Batelle's Pacific Northwest Division/U.S. Geological Survey, Biological Resources Division; the Idaho Fish and Game Commission; the American Fisheries Society; over 200 Fisheries scientists-, the Nez Perce Tribe and other Columbia River Treaty Tribes; the Affiliated Tribes of Northwest Indians; Oregon's Governor Kitzhaber; Alaska's Governor Knowles; and many others.

The Tribal Circumstances Report prepared for the United States Army Corps of Engineers concludes that only breaching the four lower Snake River dams offers the Nez Perce Tribe and the other Columbia River Treaty Tribes significant reversal of the cumulative trend of losses to Treaty-protected salmon harvests, and provides substantial relief from the risk of extinction of Treat protected stocks.

NMFS acknowledges the high risk of extinction for Snake River salmon, and also that breaching provides the best opportunity for recovering these stocks. However, NMFS declines to recommend breaching, and attempts to distance itself from the collaborative, peer-reviewed conclusions of the PATH process, instead creating its own analysis relying on its own modeling process, assumptions, and parameters, all of which have continued to change even during the review period of the draft salmon plans.

The United States' draft salmon plans continue to delay implementation of a major overhaul to the Federal Columbia River Power System, a delay which Snake River salmon cannot afford.

The Nez Perce Tribe is extremely concerned that the United States' draft plans assume that salmon have additional time to wait. The alarm clock on the extinction of Snake River salmon went off nine years ago with -NMFS' initial Snake River salmon listing in 1991. Since that initial listing, additional Snake River runs have been listed, and the rate of decline has accelerated for most listed populations. NMFS' 1998 biological opinion expressly recognized that only a long term system configuration to the FCRFS will achieve sufficient improvements in Snake River salmon survival to ensure perpetuation of the listed species. Having now delayed its decision for five years, NMFS now attempts to delay and defer this decision further. One of the region's most eminent salmon scientists, Dr. Mundy, has calculated that the mean time to extinction for Snake River spring/summer chinook index stocks is rapidly approaching in 2017. Indeed, in areas the Middle Fork of the Salmon River located within the Snake River Basin where habitat is pristine and no hatchery intervention has occurred,² such as Marsh Creek and Sulfur Creek³ (tributaries to the Middle Fork of the Salmon River), there have been multiple years in which no spring/summer

² The Middle Fork of the Salmon River is situated mainly within the Frank Church River of No Return Wilderness and has been managed as an "genetic refuge" for wild spring and summer chinook salmon and steelhead. Four of seven (57%) of the monitored salmon spawning aggregates in the Middle Fork of the Salmon River have reached zero spawners in index areas for one or more years. A fifth spawning aggregate (Big Creek) has had two consecutive years of one redd only (1995-1996). This means that 71% (5 of 7) of the monitored salmon spawning aggregates in the Middle Fork of the Salmon River "genetic refuge" have had index area salmon numbers of zero.

³ NMFS has identified these streams as Snake River spring/summer chinook "index stocks."

chinook spawners have returned.⁴ Given the dire status of Snake River salmon, delays in implementing a major overhaul to the FCRPS will contribute to extinction and prevent salmon recovery.

The United States' draft salmon plans continue status quo operation of the FCRPS, and rely on speculative "offsite mitigation" measures outside the action agencies' control.

NMFS acknowledges *that the* minor tweaks it proposes to the hydrosystem will continue to jeopardize Snake River salmon, even under NNTS' watered-down jeopardy standard. However, rather than recommending breaching the four lower Snake River dams, obtaining additional water from the Upper Snake River, or requiring hard flow requirements, NMFS imposes the burden created by the FCRPS's harvest of Snake River salmon on non-hydro activities. NMFS relies on the unproven benefits of speculative measures outside the hydrosystem--many of which are outside the action agencies' control-- to conclude that the operation of the FCRPS will avoid jeopardy. NMFS also unveils a new concept of "full mitigation" crafted to "cap" the responsibility of the FCRPS for salmon protection and restoration, a concept which has no basis in the treaty case law, the Endangered Species Act, or in the biological needs of *the salmon*.

The United States' draft salmon plans fail to significantly reduce the mortality the FCRPS imposes on Snake River salmon.

The Federal Columbia River Power System's harvest of salmon must be addressed at its source to meet the necessary 2-6% smolt to adult returns necessary to rebuild Snake River salmon.

The United States' draft salmon plans contain no firm assurances that the mix of proposed immediate actions can or will be implemented.

The draft salmon plans rely heavily on research, studies, process, and planning, and are short on implementing substantive actions that are urgently needed. Given the admitted uncertainties in evaluating effectiveness of off-site mitigation actions, and the difficulty is separating off-site mitigation actions from ongoing programs and activities the draft salmon plans contain no assurances that they will meet the 2-6% smolt-to-adult returns PATH identified as necessary for restoring Snake River spring/summer chinook.

The United States' draft salmon plans do not adequately compensate for the impacts of the FCRPS on Snake River salmon, even if 0 of the speculative actions were implemented.

The reliance on "offsite mitigation" incorrectly assumes that it is possible to mitigate for the FCRPS harvest of salmon. The Independent Scientific Group's 1996 report *Return to the River* called for

⁴ Six other individual salmon spawning aggregates in the Snake River basin have had zero spawners return during recent years, along with an additional number of smaller spawning aggregates.

“normative river conditions” and restoration of ecological processes to provide for the survival and rebuilding of salmon in the Snake and Columbia Basins. NWS ignores this fundamental ecological need in its "off-site mitigation" approach. While NNTS touts the benefits it believes may be derived from habitat improvement, it fails to recognize that the limiting habitat factor for Snake River salmon is the four lower Snake River dams and that 140 miles of mainstem habitat would be restored by breaching the four lower Snake River dams.

The United States' draft salmon plans fail to provide a time frame linking the realization of any benefits with the biological needs of Snake River salmon.

The off-site mitigation approach will result in the loss of precious time toward rebuilding, and delays directly addressing the FCRPS harvest of salmon. (The draft salmon plans provide no assurances that Snake River salmon can afford additional delays, or that Snake River salmon would reap the benefits of the speculative offsite mitigation measures within the time frame that will benefit salmon.)

The United States' draft salmon plans fail to recognize that the most relevant performance standard, smolt-to-adult returns, is not being achieved.

The draft salmon plans propose developing additional “performance standards” while ignoring that the real performance standard is that the runs are continuing to decline and the plans do not put the United States on a course for meeting the 2-6% smolt to adult returns that PATH identified as necessary for recovery of Snake River spring and summer chinook.

The United States' draft salmon plans improperly prioritize the hydrosystem's harvest of salmon while treating everything else, including treaty tribal harvest, as "offsite mitigation" for the hydrosystem's harvest.

The Nez Perce Tribe, by virtue of its treaty-reserved fishing right, has a priority right to harvest salmon. The United States, rather than honoring this priority right and implementing its trust responsibility to the Tribe, treats the Tribe's legal right as simply another source of "offsite mitigation" for the FCRPS' continued harvest of salmon. The United States' attempt to harvest the salmon first through its operation of the FCRPS and then place the burden of conservation and rebuilding on the treaty Indian fishery is very similar to the actions that triggered the seminal treaty fishing rights cases of U.S. v. Oregon and U.S. v. Washington. Such an effort to place the Tribe's treaty-secured right at the end of the line without reducing the FCRPS harvest, is not consistent with the treaties or with the large body of treaty case law.

The draft salmon plans fail to recognize that the Nez Perce Tribe has, at an enormous economic, social, and cultural cost, already voluntarily restricted its treaty fishery out of concerns for the resource. The Tribe has not had a commercial fishery on summer chinook since 1964 and spring chinook since 1977. Unfortunately, the United States has not taken commensurate actions to restrict its own harvest activities to ensure that it fulfills its treaty and trust obligations to the Nez Perce Tribe, leaving the Tribe with remnant fisheries. Rather than rectify this situation, the draft salmon

plans attempt to cap the Tribe's remnant fisheries, move the treaty fisheries from the usual and accustomed places recognized in the Treaty to terminal areas, restrict treaty fisheries to selective gear while continuing the non-selective harvest in the FCRPS and in other federal activities such as federal land management, and "crediting" the hydrosystem with these restrictions of the treaty Indian fishery. This is unacceptable.

The United States' draft salmon plans misguidedly continue to rely on transportation.

NMFS continues to rely heavily on transportation in its draft salmon plans, though it does not directly address the flaws of this decades-long experiment in the biological opinion. The Independent Peer Review Report - *Transportation of Juvenile Salmonids from the Hydroelectric Projects in the Columbia River Basin* (1994) stated that available science is not sufficient to identify transportation as either a primary or supporting method of choice for salmon recovery in the Snake River basin- The Independent Scientific Advisory Board report *Review of Transportation and Overview of Corps Capital Construction* (February 1999) stated that benefits of fish transportation are highly uncertain. PATH found that the transportation survival rates are well below the needed 2-6% smolt to adult return rate and are generally below 1%. "Transport-to-control ratios," "D values," or "relative survival of transported vs. non-transported fish" are irrelevant; the real issue is that sufficient adult returns are not occurring (absolute survival) to reach the 2-6% smolt-to-adult return rate. Fish transport analysis must include a comparative analysis of increased spill.

The United States' draft salmon plans fail to ensure diverse approaches are taken to utilizing hatcheries.

The Tribe views artificial production as a tool to increase survival and adult returns to prevent extirpation and assist in rebuilding salmon runs, through using appropriate broodstock, using a proportion of natural spawners with hatchery fish in the spawning protocol, mimicking the profile and biological traits of the natural population, allowing hatchery adults to spawn to increase natural production, releasing juveniles into a variety of habitats to encourage a diversity of life history traits, and using the survival advantage gained in the hatchery environment to increase survival and return of adult salmon to Snake River basin's tributary streams

The hatchery elements of the draft salmon plans:

fail to identify the survival advantage that the vague hatchery facility and program improvement "reforms" will provide.

fail to recognize that many hatchery programs were intended to provide mitigation, and this purpose must be made up elsewhere such as through overhauling the hydrosystem, not simply lost as hatchery facilities are "reformed" for other purposes.

fail to ensure that U.S. v. Oregon will provide a forum for making decisions on artificial production.

fail to identify the source of money for capital and operating and maintenance costs.

seriously under estimates the costs of "reforms," since each hatchery facility in the Basin has a long list of *necessary capital* construction improvements in addition to operational and monitoring and evaluation mandates.

fails to recognize Nez Perce Tribal Hatchery's implementation of NATURES rearing approach on a production scale and fails to recognize that while the intention of many programs is to utilize natural rearing techniques, few of the existing facilities are capable of providing these conditions - other than perhaps at very low densities.

fails to provide a mechanism for implementing any of the reforms.

fails to recognize that the Northwest Power Planning Council does not have authority over Mitchell Act facilities.

seriously underestimates the risk of extinction and overestimates the probability of recovery, because of the faulty assumptions relied upon such as assuming that habitat survival boosts will be immediately realized and that hatchery-reared fish have zero spawning success in natural conditions.

The United States' draft salmon plans correctly include Upper Snake projects in the draft Biological Opinion, but fail to provide the flow augmentation volumes "essential" for Snake River salmon.

The operation of the Upper Snake River Bureau of Reclamation projects cannot be separated from the operation of the FCRPS. As has long been recognized, and as NNES has acknowledged in the present Biological Opinion on the FCRPS, additional augmentation water volumes are "essential" in the Snake River. The Northwest Power Planning Council's Strategy for Salmon calls for 1 million acre-feet of water in addition to the 427 kaf and the state and tribal Detailed Fisheries Operating Plan calls for 1.5 million acre-feet of water in addition to the 427 kaf. This additional water for flow augmentation becomes even more essential in the absence of breaching the dams on the lower Snake River.

The United States draft salmon plans must incorporate the joint tribal and state position regarding operation of Dworshak reservoir.

The Lower Clearwater River is an important producer of Snake River fall chinook salmon, which are listed under the Endangered Species Act. The numbers of spawners have been increasing in recent years. Flows released from Dworshak Reservoir must address the 110% total dissolved gas standard for the Clearwater River, and must also accommodate temperature needs for the rearing and smoltification of listed fall chinook salmon produced in the Lower Clearwater River. Releasing 48 - 50 degree Fahrenheit water in the summer from Dworshak Dam to reduce Lower Snake water temperatures drastically reduces temperatures in the Lower Clearwater River, affecting growth rates

and migration timing of fall chinook produced in the Lower Clearwater River. Additionally, these release are likely causing other ecosystem impacts, possibly to the species composition and density of aquatic macro invertebrates, an important food source for subyearling chinook

The federal government must develop a solution to water temperature exceedences in the lower Snake River that does not rely solely on spill at Dworshak. Once again, hydro operations aimed at adjusting for non-normative conditions created by a dammed Lower Snake River are causing impacts elsewhere in the basin. The federal agencies have identified such solutions, including breaching the four lower Snake River dams.

The federal action agencies should prioritize the use of Upper Snake/Brownlee water for spring flow augmentation, and reserve Dworshak water for summer cooling. A VARQ flood control operation should be developed and implemented for Dworshak Reservoir, as well as for Libby and Hungry Horse *Reservoirs*.

Any proposal by the Corps, as the agency responsible *for* ensuring that its facilities comply with water quality standards, that requests spill to levels that exceed the 110% total dissolved gas standard must be submitted for approval by the Nez Perce Tribe and the State of Idaho in the process developed by the Tribe and the State.⁵

⁵ **Conditions**

1. The Dworshak Project will be at full pool (elevation 1600 ft) by June 30th.
2. The Dworshak Pool will be maintained at elevation 1600 ft through July 31st.
3. On August 31st the Dworshak pool will be at or above elevation 1537 ft This will provide 200,000-acre feet to meet late summer/fall augmentation needs.
4. All releases from Dworshak for the purposes Of anadromous fish migration and water temperature control must be first approved by the Tribe and the State upon a finding that the release is supported by scientifically defensible water quality and fish migration studies and data.
 - Supporting studies and/or data must show that Dworshak releases will achieve their stated purpose(s).
 - Releases from Dworshak will not interfere with the Tearing and migration of Clearwater River fall chinook smolts.
 - Specific flow augmentation releases will be authorized jointly in writing by the designated representatives of the Tribe and the State within this framework, after demonstration that there is scientifically defensible support for the release.
 - Releases will be approved only with the written concurrence of both parties.
5. The US Army Corps of Engineers will maintain the dissolved gas and temperature monitoring network, including monitoring stations at Dworshak, Peck and Lewiston. These stations will be operated and maintained on a continuous basis during the period of the short-term activity exemption except that the Dworshak station will be operated and maintained.

The Nez Perce Tribe prescribes the following general operations. Winter and spring drafting must not jeopardize the refill of Dworshak. The reservoir must be at full pool (elevation 1600 ft.) by June 30th and remain full until July 31. Dworshak must not be drafted to elevation 1520 as described in the Biological Opinion by August 31st. At least 20 feet or 200,000-acre feet will be reserved for September augmentation to benefit late migrating Clearwater fall chinook smolts; and returning adults. This volume is not in addition the NMFS proposed 80-foot summer Dworshak draft. *The* reservoir will be drafted to elevation 1520 no sooner than September 15th.

Of great importance to the Nez Perce Tribe are *the* impacts that Dworshak reservoir drawdowns have on cultural resources within the inundated area. The federal government has a trust responsibility as well legal obligations to limit impacts caused by reservoir operations to cultural sites within Dworshak reservoir. The federal government must consult with the Tribe on a government-to-government basis prior to operations that may impact these cultural sites. There well over 300 documented cultural sites within the area influenced by reservoir operations. In 1999, the Tribe completed an initial monitoring and evaluation project entitled Dworshak Reservoir, 1999 Cultural Resources Monitoring Project. *The* main objective of the Project was to study the nature and rate of site erosion and deposition caused by various impacts. A small sample of twelve archeological sites located *within* six physiographic zones in the reservoir environment, including the Lower Canyon zone, Lower Middle Canyon zone, Upper Middle Canyon zone, Upper Canyon Zone 1, Upper Canyon Zone 2, and Upper Canyon Zone 3 were selected to monitor. The report concluded that sites selected for study were overwhelmingly impacted by project operations and by other human and natural forces. The report recommends that to better protect important cultural sites, the monitoring project should continue on a long-term basis to gather more data to further study the nature and rate of site erosion and deposition. Furthermore, the report recommends reservoir patrols should be conducted during drawdowns to monitor for illegal artifact collection-year-around.

Exceptions

Exceptions to these conditions may be granted under unusual circumstances (e.g. drought specific fish passage needs, flood management requirements, etc.) if supported by scientifically defensible data and/or studies,

The request for an exception will be made in writing to the Tribe and the State, and may result in a meeting with designated tribal and state representatives in Lewiston.

Scientific data supporting the need for exception will be attached to the request.

A joint decision regarding the request for exception will be issued in writing by designated tribal and state representatives.

System Operation Requests for use of Dworshak water for flow augmentation and temperature control will not be presented to the NMFS Adaptive Management Process (TMT, IT) until after the request for exception is approved and issued by the designated state and tribal representatives.

Exceptions will be approved only with written concurrence of both parties.

The project results indicate that ten-acre sites exhibiting a higher average deposition rate may still possess intact subsurface cultural remains.

The impacts of the loss of habitat in the North Fork Clearwater has not been offset. The federal government needs to explicitly address the impacts and remediation of losses of prime habitat that affect the Tribe's treaty-reserved rights. The Hells Canyon Complex needs to be examined in addition to the Lower Snake River Dams in terms of fish passage. Additionally, the mitigation operations need to be revamped to reflect effective genetic and productivity goals comparable to the impacts inflicted by the projects. The role of habitat that has been eliminated by all projects needs to be examined, and these areas need to be restored functionally to the overall system.

The United States' draft salmon plan fails to comply with the Clean Water Act

The Clean Water Act is a separate and distinct legal obligation from the Endangered Species Act. "[T]he Endangered Species Act and the Clean Water Act are distinct statutory schemes. Compliance with one statute does not equal compliance with the other. National Wildlife Federation v. U.S. Army Corps of Engineers 92 F.Supp.2d 1072 (D.Or. 2000). The Clean Water Act requires federal facilities to comply with federally approved water quality standards. As the United States District Court has recently held, the Corps' four lower Snake River dams must comply with this requirement. Id.

The draft salmon plans treat the federally-approved water quality standards for temperature and dissolved gas standards as "long-term goals" rather than standards which the Corps is legally obligated to comply with. The draft water quality "plan" is not a plan that will result in compliance with temperature and dissolved gas standards; it is a plan to develop a plan to "address" water quality standards at some unspecified time in the future through some indeterminate means. The draft salmon plans contain no substantive detail, no implementation time frame, and no deadline for the achievement of water quality compliance.

EPA modeling has already demonstrated that the primary causes of temperature and dissolved gas standard exceedences are attributable to the operation of the Federal Columbia River Power System. The focus should be on implementing measures necessary to improve water quality, not on developing a Total Daily Maximum Load that will reach the same conclusion EPA has, and does not contain any mechanism for implementing enforceable measures necessary to improve water quality. Rather than creating more water quality processes, and spending additional time, money and resources on planning, resources should be spent on implementing measures necessary to improve water quality, including the best option for achieving water quality standards-breaching the four lower Snake River dams.

NMFS' adaptive management process has failed.

NMFS "Regional ESA Forum" has been wholly ineffective at recognizing, much less administering multiple legal obligations. This failure has led the Nez Perce Tribe, the three other Columbia River Treaty Tribes, and the State of Montana to formally withdraw from this

process. The United States must honor its treaty and trust obligations before it administers its other statutory obligations.

We urge the United States to address these issues in developing a federal salmon plan that honors its legal and moral obligations to the Nez Perce Tribe.

Sincerely,

Samuel N. Penney
Chairman